

1
2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 MARKIECE PALMER,

6 Petitioner,

7 v.

8 TIM GARRETT,¹ et al.,

9 Respondents.
10

Case No. 3:18-cv-00245-HDM-CLB

ORDER

11 **I. Summary**

12 This is a habeas matter under 28 U.S.C. § 2254. Before the
13 Court is respondents' motion to dismiss the second amended petition
14 ("petition") as mixed claiming Grounds 5(B)-5(F) and 6-10 were not
15 fairly presented to the state courts, or alternatively to dismiss
16 those grounds as procedurally defaulted. (ECF No. 61.) The motion
17 is granted in part and denied in part.

18 **II. Procedural Background**

19 A jury convicted Palmer of one count of murder and two counts
20 of child abuse, neglect, or endangerment with substantial bodily
21 harm, for the death of seven-year-old R.J. (ECF No. 20-5.) Palmer
22 was sentenced to life without the possibility of parole. (ECF No.
23 20-7.) Palmer timely appealed and the Nevada Supreme Court affirmed
24 the convictions. (ECF Nos. 24-1; 24-4.)

25
26 ¹ According to the state corrections department's inmate locator page,
27 Palmer is incarcerated at Lovelock Correctional Center. The department's website
28 reflects that Tim Garrett is the warden for that facility.
https://doc.nv.gov/Facilities/LCC_Facility/. The Court will therefore direct
the clerk to substitute Tim Garrett for respondent William Gittere, under, *inter*
alia, Rule 25(d) of the Federal Rules of Civil Procedure.

1 Palmer thereafter filed two *pro se* motions alleging, among
2 other things, that trial counsel failed to suppress Palmer's
3 statement to police as a violation of *Miranda*.² (ECF Nos. 21-4;
4 21-5.) The state district court construed the motions as a
5 postconviction petition for writ of habeas corpus and denied all
6 claims. (ECF No. 38-19.) Palmer appealed and the Nevada Supreme
7 Court affirmed the state district court's denial of relief for the
8 claims that Palmer had raised in the state district court but
9 declined to consider five additional claims Palmer raised for the
10 first time on appeal. (ECF No. 24-6.)

11 Palmer filed a *pro se* federal habeas corpus petition and an
12 amended petition. (ECF Nos. 7; 19.) Respondents moved to dismiss
13 the amended petition and Palmer moved to stay this action while he
14 exhausted in the state courts a claim that he newly alleged in the
15 amended petition. (ECF Nos. 30; 45; 47.) The Court granted a stay,
16 granted leave to refile, and denied Respondents' motion to dismiss
17 without prejudice. (ECF No. 49.)

18 The state district court dismissed Palmer's second state
19 postconviction petition for writ of habeas corpus as untimely and
20 successive. (ECF No. 46-5.) Palmer appealed and the Nevada Supreme
21 Court affirmed finding the second postconviction petition was
22 procedurally barred as untimely and successive, and constituted an
23 abuse of the writ to the extent that Palmer failed to demonstrate
24 cause and prejudice to overcome the default of his claims. (ECF
25 No. 52-2.)

26 ///

28 ² *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 The Court granted Palmer's request to reopen his federal case
2 and Palmer filed a second amended petition. (ECF Nos. 54; 58.)

3 **III. Legal Standards**

4 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner must
5 exhaust state court remedies on a claim before presenting that
6 claim to a federal court. The exhaustion requirement ensures the
7 state courts, as a matter of federal-state comity, have the first
8 opportunity to pass upon and correct alleged violations of federal
9 constitutional guarantees. *See Coleman v. Thompson*, 501 U.S. 722,
10 731 (1991). "A petitioner has exhausted his federal claims when he
11 has fully and fairly presented them to the state courts." *Woods v.*
12 *Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014) (citing *O'Sullivan*
13 *v. Boerckel*, 526 U.S. 838, 848-49 (1999) ("Section 2254(c) requires
14 only that state prisoners give state courts a *fair* opportunity to
15 act on their claims.")).

16 The Supreme Court has recognized that under certain
17 circumstances it may be appropriate for a federal court to
18 anticipate the state-law procedural bar of an unexhausted claim,
19 and to treat such a claim as subject to the procedural default
20 doctrine. A federal court need not dismiss an exhausted claim if
21 it is clear that the state court would find the claim procedurally
22 barred. *Coleman*, 501 U.S. at 731 ("An unexhausted claim will be
23 procedurally defaulted, if state procedural rules would now bar
24 the petitioner from bringing the claim in state court."); *see also*
25 *Castille v. Peoples*, 489 U.S. 346, 351-52 (1989); *Dickens v. Ryan*,
26 740 F.3d 1302, 1317 (9th Cir. 2014); *Sandgathe v. Maass*, 314 F.3d
27 371, 376 (9th Cir. 2002).

28 ///

1 Where a petitioner "has defaulted his federal claims in state
2 court pursuant to an independent and adequate state procedural
3 rule," federal habeas corpus review "is barred unless the prisoner
4 can demonstrate cause for the default and actual prejudice as a
5 result of the alleged violation of federal law or demonstrate that
6 failure to consider the claims will result in a fundamental
7 miscarriage of justice." *Coleman*, 501 U.S. at 750. To demonstrate
8 cause, the petitioner must establish some external and objective
9 factor impeded efforts to comply with the state's procedural rule.
10 *E.g.*, *Maples v. Thomas*, 565 U.S. 266, 280, 289 (2012) (finding
11 cause to excuse procedural default due to attorney abandonment but
12 remanding for a determination of prejudice); *McCleskey v. Zant*,
13 499 U.S. 467, 497 (1991) (holding that for cause to exist, the
14 external impediment must have prevented the petitioner from
15 raising the claim). "[T]o establish prejudice, [a petitioner] must
16 show not merely a substantial federal claim, such that 'the errors
17 . . . at trial created a possibility of prejudice,' but rather
18 that the constitutional violation 'worked to his actual and
19 substantial disadvantage.'" *Shinn v. Ramirez*, 142 S. Ct. 1718,
20 1732 (2022) (citing *Murray v. Carrier*, 477 U.S. 478, 494 (1986)
21 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982))
22 (emphasis in original)).

23 With one exception, Nevada's cause and prejudice standards
24 are functionally identical to the federal standards for cause and
25 prejudice. *Robinson v. Ignacio*, 360 F.3d 1044, 1052 n.3 (9th Cir.
26 2004); *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 35-
27 36 (2006). That exception is for a procedurally defaulted claim of
28 ineffective assistance of trial counsel when the cause for the

1 default is the ineffective assistance or absence of postconviction
2 counsel in the initial postconviction proceedings in accordance
3 with *Martinez v. Ryan*, 566 U.S. 1 (2012). *Brown v. McDaniels*, 130
4 Nev. 565, 571–76, 331 P.3d 867, 871–75 (2014). A Nevada federal
5 habeas petitioner who relies on *Martinez*—and only *Martinez*—as a
6 basis for overcoming a state procedural bar can successfully argue
7 that the state courts would hold the claim procedurally barred,
8 but that he nonetheless has a potentially viable argument for cause
9 and prejudice under federal law.

10 According to the Supreme Court, the necessary circumstances
11 for establishing “cause” to excuse a procedural default of an
12 ineffective assistance of trial counsel claim are:

13 [W]here (1) the claim of “ineffective assistance of
14 trial counsel” was a “substantial” claim; (2) the
15 “cause” consisted of there being “no counsel” or only
16 “ineffective” counsel during the state collateral review
17 proceeding; (3) the state collateral review proceeding
18 was the “initial” review proceeding in respect to the
19 “ineffective-assistance-of-trial-counsel claim”; and
20 (4) state law requires that an “ineffective assistance
21 of trial counsel [claim] . . . be raised in an initial-
22 review collateral proceeding.”

23 *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (quoting *Martinez*, 566
24 U.S. at 18–19). To show a claim is “substantial,” a petitioner
25 must demonstrate it has “some merit.” *Martinez*, 566 U.S. at 14. A
26 claim is “insubstantial” if “it does not have any merit or . . . is
27 wholly without factual support.” *Id.* at 16.

28 **IV. Discussion**

A. Grounds 5(B)–5(F)

Grounds 5(B)–5(F) allege ineffective assistance of trial
counsel. (ECF No. 58 at 27–36.) Respondents contend these grounds
were not fairly presented to the state courts and are procedurally

1 defaulted. (ECF No. 61 at 7-9.) Palmer concedes those grounds were
2 not fairly presented to the state courts but requests the Court
3 find the claims technically exhausted and therefore procedurally
4 defaulted because a state court petition raising the claims at
5 this juncture would be dismissed as procedurally barred. (ECF No.
6 63 at 2-4.) Palmer further requests the Court determine the
7 ineffective assistance of counsel claims alleged in Grounds 5(B)-
8 5(F) are substantial, or alternatively, defer ruling whether
9 Palmer can overcome procedural default under *Martinez* until
10 consideration of the merits of the petition. (*Id.* at 4-13.)
11 Respondents concede Palmer may rely on *Martinez* to overcome the
12 procedural default and requests the Court defer the analysis
13 whether Palmer can overcome the default until review of the merits
14 of the petition. (ECF No. 67 at 3.)

15 In light of the rulings of the state courts in Palmer's second
16 state habeas action, it is clear that Palmer would face multiple
17 procedural bars if he were to return to state court with his
18 unexhausted claims in Grounds 5(B)-5(F). *See, e.g.,* NRS §§ 34.726;
19 34.810. As discussed, the Court may consider those unexhausted
20 claims technically exhausted, but subject to procedural default.
21 *See Dickens*, 740 F.3d at 1317; *see also supra*, pp. 3-5.

22 Because Palmer advances only *Martinez* as a basis for excusing
23 the anticipatory default of his ineffective assistance of trial
24 counsel claims in Grounds 5(B)-5(F), the Court reads Palmer's
25 opposition as a concession that the only basis for cause as to any
26 of those claims is *Martinez*. (ECF No. 63 at 4-13.) On that basis,
27 the Court grants the request to consider Grounds 5(B)-5(F)
28 technically exhausted but procedurally defaulted.

1 Nevada law requires prisoners to raise ineffective assistance
2 of counsel claims for the first time in a state petition seeking
3 postconviction review, which is the initial collateral review
4 proceeding for purposes of applying the *Martinez* rule. *See Rodney*
5 *v. Filson*, 916 F.3d 1254, 1259–60 (9th Cir. 2019). And it appears
6 Palmer was unrepresented for his initial review collateral review
7 proceeding. (ECF Nos. 21–4; 21–5; 22–1.) Thus, it appears Palmer
8 can meet three of the four *Martinez* requirements for cause to
9 overcome his procedural default. However, the Court determines
10 that the remaining issues concerning the procedural defaults of
11 Grounds 5(B) –5(F) are intertwined with the merits of those claims,
12 such that they will be better addressed in conjunction with the
13 merits of Palmer’s petition, after Respondents file an answer and
14 Palmer files a reply.

15 The Court will deny the motion to dismiss as to Grounds 5(B)–
16 5(F) without prejudice to Respondents asserting the procedural
17 default defense to the claims in their answer.

18 **B. Ground 6**

19 Respondents contend the allegations of ineffective assistance
20 of appellate counsel in Ground 6 were not fairly presented to the
21 state courts and are procedurally defaulted. (ECF No. 61 at 7–9.)
22 Palmer admits Ground 6 is procedurally defaulted and he cannot
23 overcome the default. (ECF No. 63 at 13–14.) Respondents note that
24 Palmer does not identify an alternative basis to overcome the
25 default. (ECF No. 67 at 3.)

26 Palmer does not make any showing of cause and prejudice
27 relative to the procedural default of this claim, or any other
28 showing that excuses the procedural default. And, the Supreme Court

1 has emphasized that *Martinez's* equitable exception is limited to
2 claims of ineffective assistance of trial counsel and expressly
3 declined to expand the narrow exception to claims of ineffective
4 assistance of appellate counsel. *Davila v. Davis*, 137 S. Ct. 2058,
5 2065–66 (2017).

6 The Court will thus grant the motion to dismiss Ground 6 as
7 it is procedurally defaulted.

8 **C. Ground 7**

9 Ground 7 alleges a substantive claim that Palmer's statements
10 were obtained in violation of *Miranda*. (ECF No. 58 at 39.)
11 Respondents contend Ground 7 was not fairly presented to the state
12 courts and is procedurally defaulted. (ECF No. 61 at 7–9.) Palmer
13 concedes Ground 7 was not fairly presented to the state courts but
14 contends his fully exhausted claim in Ground 5(A) (that trial
15 counsel was ineffective in failing to move to suppress Palmer's
16 statement as obtained in violation of *Miranda*, which the state
17 courts rejected in Palmer's initial postconviction relief
18 proceedings) can provide cause to excuse the default of Ground 7.
19 (ECF Nos. 58 at 39; 63 at 14–16; see also ECF No. 24–6 at 4–5.)

20 In certain circumstances, counsel's ineffectiveness in
21 failing to properly preserve a habeas claim for review in state
22 court will suffice as cause to excuse a procedural default. *Edwards*
23 *v. Carpenter*, 529 U.S. 446, 450–51 (2000) (citing *Carrier*, 477
24 U.S. at 488–89). "Not just any deficiency in counsel's performance
25 will do, however; the assistance must have been so ineffective as
26 to violate the Federal Constitution." *Id.*

27 For Palmer to establish cause to overcome the procedural
28 default of Ground 7, he must first demonstrate that trial counsel's

1 performance in failing to move to suppress Palmer's statements as
2 a violation of *Miranda* (as alleged in Ground 5(A)) was
3 constitutionally ineffective under *Strickland v. Washington*, 466
4 U.S. 668 (1984). If he does so, then counsel's ineffectiveness, as
5 alleged in Ground 5(A), may be used as cause to set aside the
6 procedural default for corresponding claims in Ground 7.

7 Respondents concede Ground 5(A) is properly exhausted and
8 Palmer may rely upon trial counsel's ineffective assistance as
9 alleged in Ground 5(A) as cause to overcome the procedural default
10 of Ground 7. (ECF No. 67 at 4.) Respondents request the Court defer
11 consideration of Ground 7 until review of the merits of Ground
12 5(A) because the question of prejudice is directly intertwined
13 with the merits of Grounds 5(A) and 7. (*Id.*)

14 The Court agrees that the question whether Palmer can overcome
15 the procedural default of Ground 7 is intertwined with the merits
16 of Ground 5(A), such that Ground 7 is better addressed in
17 conjunction with the merits of Palmer's petition, after
18 Respondents file an answer and Palmer files a reply.

19 Thus, the Court will deny the motion to dismiss as to ground
20 7 without prejudice to Respondents asserting the procedural
21 default defense to the claim in the answer.

22 **D. Grounds 8 and 9**

23 Ground 8 alleges jury instructions 12 and 13 violated federal
24 due process and Ground 5(C) is a procedurally defaulted claim that
25 trial counsel was ineffective in failing to challenge those jury
26 instructions. (ECF No. 58 at 28-32, 39-40.) Likewise, Ground 9
27 alleges the felony murder theory contained in the charging
28 instrument and jury instruction 3 violated federal due process and

1 Ground 5(D) is a procedurally defaulted claim that trial counsel
2 was ineffective in failing to challenge the felony murder theory
3 contained in the information and jury instruction No. 3. (*Id.* at
4 32-33, 40.)

5 Respondents contend Grounds 8 and 9 were not fairly presented
6 to the state courts and are procedurally defaulted. (ECF No. 61 at
7 7-9.) Palmer concedes Grounds 8 and 9 were not fairly presented to
8 the state courts and are procedurally defaulted. (ECF No. 58 at
9 39-40.) Palmer, however, asserts he can establish cause to overcome
10 the procedural default for Grounds 8 and 9 if he overcomes the
11 procedural default for his corresponding ineffective-assistance-
12 of-counsel claims in Grounds 5(C) and 5(D). (ECF No. 63 at 16-19.)

13 As noted above, ineffective assistance of counsel can, if
14 independently pleaded and proved, establish cause for a default of
15 a habeas claim. *Carpenter*, 529 U.S. at 451, 453. Where the
16 corresponding ineffective assistance of counsel claim is also
17 defaulted, a petitioner must demonstrate cause and prejudice to
18 overcome the procedural default of that claim as well. *Id.*
19 Therefore, should Palmer overcome the procedural default of his
20 ineffective assistance of counsel claims in Ground 5(C)), and also
21 as instructed in *Carpenter*, demonstrate trial counsel's
22 performance was constitutionally ineffective under *Strickland* as
23 alleged in Ground 5(C), then counsel's ineffective assistance may
24 provide cause to aside the procedural default for a corresponding
25 substantive claim in Ground 8. Likewise for Grounds 5(D) and 9.

26 Respondents counter that Palmer's approach disregards the
27 rationale of *Martinez* and *Davila*, which proscribe a narrow
28 exception to the procedural default doctrine applicable to only a

1 single claim of ineffective assistance of trial counsel. (ECF No.
2 67 at 4-5.) (quoting *Davila*, 137 S. Ct. at 2062, 2066.)
3 Respondents' argument lacks merit. Respondents are correct that
4 *Martinez* excuses the procedural default of a single claim of
5 ineffective assistance of counsel and does not overcome the
6 procedural default of the corresponding substantive claim.
7 However, assuming the procedural default of the ineffective
8 assistance of counsel claim is overcome under *Martinez*, and the
9 petitioner also proves counsel was constitutionally ineffective as
10 alleged in that ineffective assistance of counsel claim, then
11 according to *Carpenter*, counsel's constitutionally ineffective
12 assistance may supply cause to overcome the procedural default of
13 a corresponding substantive habeas claim. *Carpenter*, 529 U.S. at
14 452-53. Respondent's reliance on *Davila* is also misplaced. *Davila*
15 held that *Martinez* did not extend to procedurally defaulted claims
16 of ineffective assistance of appellate counsel; it did not purport
17 to overturn or limit *Carpenter*.

18 The Court agrees with the parties that the issues surrounding
19 the procedural default of Grounds 8 and 9 are intertwined with the
20 procedural default and merits of the claims in Grounds 5(C) and
21 5(D), such that Grounds 8 and 9 are better addressed in conjunction
22 with the merits of Palmer's petition, after Respondents file an
23 answer and Palmer files a reply. Therefore, the Court will deny
24 the motion to dismiss as to Grounds 8 and 9 without prejudice to
25 Respondents asserting the procedural default defense to the claim
26 in either answer.

27 ///

28 ///

1 **E. Ground 10**

2 Ground 10 alleges trial counsel violated Palmer's "autonomy
3 right to control his defense" under the Fifth, Sixth, and
4 Fourteenth Amendments by conceding Palmer's guilt for child abuse
5 without Palmer's knowing and voluntary consent, in violation of
6 *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). (ECF No. 58 at 40-42.)

7 Respondents claim Ground 10 was not fairly presented to the
8 state courts, is unexhausted, and is procedurally defaulted. (ECF
9 Nos. 61 at 7-9, nn.4 & 6; 65 at 7-8.) Palmer contends Ground 10
10 was fairly presented as it was actually exhausted in his second
11 postconviction relief proceedings³ and the procedural default
12 defense is unavailable to the State because the Nevada Supreme
13 Court's rejection on state procedural grounds was not independent
14 of, but was instead interwoven with, federal law. (ECF No. 63 at
15 22-25.) Respondents reply that the Nevada Supreme Court expressly
16 relied on independent and adequate state procedural rules NRS §
17 34.726(1) (untimely) and NRS § 34.810 (successive) to bar relief
18 for the claim and only discussed the merits of the claim in
19 determining whether there was cause to overcome the procedural
20 bars. (ECF No. 67 at 7-8.)

21 "In a habeas corpus proceeding, a federal court generally
22 'will not review a question of federal law decided by a state court
23 if the decision of that court rests on a state law ground that is
24 independent of the federal question and adequate to support he
25 judgment.'" *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995)

26
27 ³ Palmer acknowledges the second amended petition states that he did not fairly
28 present this claim to the state courts, however, he contends that is a
scrivener's error, as the claim was raised in his second state postconviction
petition. (ECF No. 63 at 22 n.3.)

1 (quoting *Coleman*, 501 U.S. at 727–31). A state procedural bar is
2 “independent” if the state court “explicitly invokes a state
3 procedural bar rule as separate basis for its decision.” *Id.*

4 A state court’s decision is not independent, however, if the
5 application of the state’s default rule depends on the
6 consideration of federal law. *Coleman*, 501 U.S. at 735 (federal
7 courts on habeas corpus review of state prisoner claims will
8 presume there is no independent state ground for a state court
9 decision where it fairly appears to rest primarily on federal law,
10 or to be interwoven with federal law); *Park v. California*, 202
11 F.3d 1146, 1152–53 (9th Cir. 2000). “A state law ground is so
12 interwoven if ‘the state has made application of the procedural
13 bar depend on an antecedent ruling on federal law [such as] the
14 determination of whether federal constitutional error has been
15 committed.’” *Park*, 202 F.3d at 1152 (quoting *Ake v. Oklahoma*, 470
16 U.S. 68, 75 (1985)). Under established Ninth Circuit law, a state
17 court’s application of a state procedural bar does not
18 become interwoven with and dependent upon an antecedent federal
19 constitutional ruling where the state court discusses the merits
20 solely to determine whether the petitioner can establish cause and
21 prejudice to overcome the procedural default. *Moran v. McDaniel*,
22 80 F.3d 1261, 1269 (9th Cir. 1996).

23 Here, Palmer returned to state court during a stay of this
24 action to file a (second) postconviction petition claiming trial
25 counsel’s concession of guilt without Palmer’s informed consent
26 violated Palmer’s “rights to secured autonomy” under the Fifth,
27 Sixth, and Fourteenth Amendments as discussed in *McCoy*. (ECF No.
28 46-1 at 12–14.) The state district court denied relief finding the

1 second petition procedurally barred. (ECF No. 46-5 at 5-7.) Palmer
2 appealed and the Nevada Supreme Court affirmed ruling:

3 [A]ppellant filed his petition on May 10, 2019,
4 more than one year after this court issued its remittitur
5 on direct appeal on February 20, 2018. See *Palmer v.*
6 *State*, Docket No. 67565 (Order of Affirmance, January
7 25, 2018). Thus, appellant's petition was untimely
8 filed. See NRS 34.726(1). Moreover, appellant's petition
9 was successive because he had previously litigated a
10 postconviction petition for a writ of habeas corpus on
11 the merits, and it constituted an abuse of the writ to
12 the extent that he raised claims new and different from
13 those raised in his previous petition. See NRS
14 34.810(1)(b)(2); NRS 34.810(2); see also *Palmer v.*
15 *State*, Docket No. 70970 (Order of Affirmance, March 15,
2018). Appellant's petition was procedurally barred
absent a demonstration of good cause and actual
prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS
34.810(3). Good cause may be demonstrated by a showing
that the factual or legal basis for a claim was not
reasonably available to be raised in a timely petition.
Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506
(2003). Based upon our review of the record on appeal,
we conclude that the district court did not err in
denying the petition as procedurally barred for the
reasons discussed below.

16 Appellant argues that *McCoy v. Louisiana*, 138 S.
17 Ct. 1500 (2018), provides good cause because his trial
18 counsel conceded his guilt without his informed consent.
19 He is mistaken, as *McCoy* is distinguishable. *McCoy* held
20 that an attorney may not concede a defendant's guilt of
21 a charged crime over a defendant's express objection.
22 138 S. Ct. at 1509. *McCoy* differentiated a defendant who
23 opposed counsel's concession from a defendant who "was
24 generally unresponsive" during discussions of trial
25 strategy, and "never verbally approved or protested"
26 the concession strategy. *Id.* (quoting *Florida v. Nixon*,
27 543 U.S. 175, 181 (2004)). *McCoy* did not hold that a
28 defendant must expressly consent to a concession or that
a canvass must precede a concession. See *id.* Here, trial
counsel conceded appellant's guilt to two of the three
charges (child abuse) during closing arguments but
disputed that appellant had committed first-degree
murder because the injury leading to the victim's death
was allegedly accidental. During an earlier discussion
on the record and outside the jury's presence, trial
counsel indicated that the defense might make
concessions as to the child abuse charges depending upon
how appellant's wife testified, that the strategy had
been discussed for over a year with appellant, but that
there would be no concession to the murder charge. The
court then addressed appellant, explaining the State's

burden of proof, and asked appellant whether he had discussed "decisions and strategies" with counsel. Appellant affirmatively indicated that he had done so. He did not object to the concession strategy. Because appellant never opposed the concession strategy, *McCoy* is distinguishable and does not provide good cause. We therefore need not decide whether *McCoy* applies retroactively.

To the extent that appellant argues that trial counsel did not adequately advise him of the ramifications of the concession strategy, *McCoy* likewise does not provide good cause. *McCoy* addressed "a client's autonomy, not counsel's competence," 138 S. Ct. at 1510, and any claims challenging trial counsel's advice could have been raised in appellant's first, timely petition based on *Nixon*.

[FN 1] Notably, *McCoy* did not alter the holding in *Nixon*. *McCoy*, 138 S. Ct. at 1509.

Therefore, we conclude that the district court did not err in determining that *McCoy* did not provide good cause in this case and that the district court correctly applied the mandatory procedural bars.

[FN 2] We reject the State's argument that a claim based on *McCoy* can only be raised on direct appeal. A *McCoy* claim can be raised in a postconviction habeas petition, albeit subject to the procedural bar in NRS 34.810(1)(b) because it could have been raised on appeal. See NRS 34.724(1) ("Any person convicted of a crime and under sentence of ... imprisonment who claims that the conviction was obtained ... in violation of the Constitution of the United States or the Constitution or laws of this State ... may ... file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction").

See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 233, 112 P.3d 1070, 1074, 1075 (2005).

. . . .

(ECF No. 52-2 at 2-5.)

The Court finds the Nevada Supreme Court's application of the procedural bars of NRS § 34.726(1) and NRS § 34.810(2) were independent of federal law because that court first invoked the state procedural bars for its decision and subsequently discussed

1 the merits of Palmer's claim only to show that Palmer did not show
2 cause and prejudice to overcome the procedural bars. The parties
3 do not dispute that the state procedural bars are adequate to
4 preclude federal review. Thus, the Court finds Ground 10 was
5 procedurally defaulted in state court on independent and adequate
6 state law grounds.

7 Where a procedural default constitutes an adequate and
8 independent state ground for denial of habeas corpus, the default
9 may be excused only if it will result in a fundamental miscarriage
10 of justice such as where a "constitutional violation has probably
11 resulted in the conviction of one who is actually innocent," or if
12 the prisoner demonstrates cause for the default and prejudice
13 resulting from it. *Carrier*, 477 U.S. at 495-96. Palmer alleges
14 none of these as a basis to overcome the default of Ground 10.

15 For the foregoing reasons, Ground 10 will be dismissed with
16 prejudice as procedurally defaulted on independent and adequate
17 state grounds.

18 **V. Conclusion**

19 IT IS THEREFORE ORDERED that Respondents' motion to dismiss
20 (ECF No. 61) is GRANTED IN PART AND DENIED IN PART. Grounds 6 and
21 10 of the second amended petition (ECF No. 58) are dismissed with
22 prejudice as procedurally defaulted. The motion to dismiss is
23 denied without prejudice in all other respects.

24 IT IS FURTHER ORDERED that the Court defers consideration
25 whether petitioner can demonstrate cause and prejudice to overcome
26 the procedural defaults of Grounds 5(B)-5(F) and 7-9 until the
27 time of merits review. Respondents may reassert the procedural
28 default arguments for those claims in their answer.

It IS FURTHER ORDERED that Respondents' motions for enlargement of time to file a reply in support of the motion to dismiss second amended petition (ECF Nos. 64 and 65) are granted *nunc pro tunc* to May 31, 2022, and the reply in support of motion to dismiss the second amended petition (ECF No. 67) is deemed timely filed.

IT IS FURTHER IS ORDERED that Respondents will have 120 days from the date of this order to file an answer or otherwise respond to Palmer's remaining claims in the second amended petition. In all other respects, the schedule for further proceedings set forth in the scheduling order entered May 14, 2021 (ECF No. 54) will remain in effect.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to substitute Tim Garrett for Respondent William Gittere.

DATED: this 25th day of August, 2022.

Howard D McKibben

HOWARD D. MCKIBBEN
UNITED STATES DISTRICT JUDGE